TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 214.

RACHEL B. BROWN, PLAINTIFF IN ERROR,

vs.

THOMAS O. SELFRIDGE.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED FEBRUARY 26, 1912.

(22,036.)

(22,035.)

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In the Court of Appeals of the District of Columbia.

No. 2008.

RACHAEL B. BROWN, Appellant,
vs.
THOMAS O. SELFRIDGE.

a Supreme Court of the District of Columbia.

At Law. No. 50359.

RACHAEL B. BROWN, Plaintiff,
vs.
THOMAS O. SELFRIDGE, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Declaration.*

Filed March 17, 1908.

In the Supreme Court of the District of Columbia.

At Law. No. 50359.

RACHAEL B. BROWN, Plaintiff,
vs.
THOMAS O. SELFRIDGE, Defendant.

The plaintiff, Rachael B. Brown, sues the defendant, Thomas O. Selfridge, for that, heretofore, to-wit, on the 26th day of December, A. D., 1907, the plaintiff was in the peaceful and quiet possession of certain premises known as 717 Eighth Street, Northwest, in the City of Washington, District of Columbia; that the said defendant, contriving and maliciously intending to injure the plaintiff in her good name, fame and credit, and to bring her into public scandal, infamy

and disgrace, on the said 26th day of December, A. D., 1907, appeared before the Judges of the Police Court of the District of Columbia, and then and there under oath falsely, maliciously and without probable cause, charged that twelve curtains of the value of three hundred dollars ($300), the personal Chattels of the said defendant, Thomas O. Selfridge, had within two hundred days last past, by some person or persons unknown, been stolen, taken and carried away out of his possession in the District of Columbia, and County of Washington, and that he had probable cause to suspect and did suspect that the said goods and chattels were then concealed in the premises of the plaintiff, and Mary Levy, known as No. 717 Eighth Street, Northwest, in the City of Washington, in said County
2 and District that upon said affidavit the said defendant, without any reasonable, or probable cause whatever, procured the Judges of said Police Court to issue a warrant under their hand and the seal of said Police Court, directed to the Major of Police of the District of Columbia, in which said warrant the gist of said affidavit was set forth, and the said Major was thereby authorized and required in the name of the United States, with the necessary and proper assistance to enter, in the day time, into said premises, there to diligently search for the said goods, and if the same or any part thereof be found upon such search, to bring the goods so found, and the bodies of the said Rachael Brown and Mary Levy before the Police Court of the District of Columbia, to be disposed of and dealt with according to law; that by virtue and under color of said warrant, the said Major of the Police of the District of Columbia, to whom it was directed, and who was thereby charged with its execution, through his agents, servants and employees, to wit, three officers or detectives, without any reasonable or probable cause whatsoever, and without the leave or license and against the will of the plaintiff, on the said 26th day of December, 1907, entered the said dwelling house of the said plaintiff in the day time and searched and ransacked the same, and the rooms and apartments thereof, hunting for said goods, and flung, tossed, and tumbled the furniture, wearing apparel and other contents thereof, and thereby greatly disturbed and disquieted the plaintiff in the possession of said
3 house and premises; that neither the twelve curtains of the defendant aforesaid, alleged to have been stolen, nor any other goods or chattels of the defendant, feloniously stolen, were found in the plaintiff's said house, nor were there any such goods and chattels therein before, at the time of the said complaint, or at any other time, whatever, and the defendant had no reasonable or probable cause for making the said complaint or causing the said warrant to be issued or executed; that thereafter, the said search warrant was returned to the Police Court by one of said detectives or officers for the said Major of Police of the District of Columbia, with the indorsement thereon as follows: "Return 'search made and nothing found. P. M. J. W. Green, M. P.'" Whereupon the said proceeding, which thereafter became known on the records of said Police Court of the District of Columbia as United States *vs.* Rachael Brown and Mary Levy, and numbered 156,303, on said record, was,

by the Assistant United States District Attorney, on the 11th day of January, 1908, nolle prossed, and on the 13th day of January, 1908, entered on the record of the said Police Court of the District of Columbia, as nolle prossed by the Assistant District Attorney, with the consent of the Court, and the said charge and proceeding aforesaid was thereby wholly and forever ended and determined.

By means whereof, the plaintiff not only suffered and will continue to suffer, great pain of body and mind, and was greatly exposed and injured in her credit, reputation and circumstances, and injured and prevented from properly pursuing her business of maintaining a boarding house, but has sustained great damage to
4 her aforesaid business, and was further rendered sick and nervous, and compelled to expend and lay out a large sum of money, to wit, one hundred dollars ($100) for the services of a physician in the purchase of medicine in and about an endeavor to be cured of said sickness and nervousness; and by reason whereof the plaintiff is further greatly injured, impoverished and otherwise damnified.

Wherefore, plaintiff brings this suit and claims the sum of twenty thousand dollars ($20,000) damages, besides costs.

LAMBERT & McLEAN,
RUDOLPH H. YEATMAN,
Attorneys for Plaintiff.

Notice to Plead.

The defendant is to plead hereto on or before the twentieth day, exclusive of Sundays and Legal Holidays, next occurring after the date of service hereof; otherwise judgment.

LAMBERT & McLEAN,
RUDOLPH H. YEATMAN,
Attorneys for Plaintiff.

5 *Plea.*

Filed April 6, 1908.

In the Supreme Court of the District of Columbia.

At Law. No. 50359.

RACHEL B. BROWN
vs.
THOMAS O. SELFRIDGE.

For plea the defendant says: He is not guilty as alleged.

GORDON & GORDON,
Attorneys for the Defendant.

Joinder of Issue.

Filed April 10, 1908.

In the Supreme Court of the District of Columbia.

At Law. No. 50359.

RACHAEL B. BROWN
vs.
THOMAS O. SELFRIDGE.

The plaintiff joins issue upon the plea of the defendant filed to the declaration herein.

LAMBERT & McLEAN,
RUDOLPH H. YEATMAN,
Attorneys for Plaintiff.

6 Supreme Court of the District of Columbia.

WEDNESDAY, *February 24th*, 1909.

Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh, Chief Justice, presiding.

* * * * * * *

No. 50359. At Law.

RACHAEL B. BROWN, Plaintiff,
vs.
THOMAS O. SELFRIDGE, Defendant.

Come again the parties hereto aforesaid, in manner aforesaid and the same jury that was respited herein on the 18th instant, who, after further hearing the case and being given the same in charge upon their oath say they find the issues herein in favor of the defendant.

Thereupon, the plaintiff by her attorney moves that judgment be entered forthwith; wherefore, it is considered and adjudged that the plaintiff herein recover of defendant nothing by this action, that the defendant go hereof without day, be for nothing held and recover of plaintiff his costs of defense to be taxed by the clerk and have execution thereof.

From the aforegoing the plaintiff by her attorneys in open court notes an appeal to the Court of Appeals of the District of Columbia and the penalty of a bond for costs is hereby fixed in the sum of Fifty Dollars.

7 *Memorandum.*

March 1st, 1909.—Appeal bond filed.

Supreme Court of the District of Columbia.

FRIDAY, *March 26th*, 1909.

Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh, Chief Justice, presiding.

* * * * * * *

At Law. No. 50359.

RACHEL B. BROWN, Plaintiff,
vs.
THOMAS O. SELFRIDGE, Def't.

Comes now the plaintiff by her attorney Mr. Wilton J. Lambert, and submitting to the court the Bill of Exceptions taken at the trial of the cause prays that the same be signed and made of record, *nunc pro tunc*, which is accordingly done.

Bill of Exceptions.

Filed March 26, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 50359.

RACHEL B. BROWN
vs.
THOMAS O. SELFRIDGE.

8 Be it remembered, That the above entitled cause came on for trial before Mr. Chief Justice Clabaugh and a jury on the 17th day of February, 1909.

Whereupon, the plaintiff to maintain the issues on her part joined offered as a witness John B. Peyton, who testified that he was a Deputy Clerk in the Police Court of the District of Columbia, and was such in December, 1907. Upon request he thereupon produced an affidavit signed by Thomas O. Selfridge and warrant issued thereon, and the Docket of the Police Court of the District of Columbia showing the entries in the case of United States *vs.* Rachel Brown and Mary Levy, which, he testified, were in his custody at the present time as such clerk and had been in his custody as such clerk continuously since December 26, 1907. Thereupon the said affidavit and warrant and the endorsements thereon, and so much of said docket as showed the entries in said case were offered in evidence and read to the jury, and are of the tenor following, to wit:

Affidavit of Complainant.

In the Police Court of the District of Columbia.

DISTRICT OF COLUMBIA,
County of Washington, ss:

On this 26 day of Dec. one thousand nine hundred and seven, personally came before Ivory G. Kimball and Alexander R. Mullowny, Judges of the Police Court of the District of Columbia, Thomas O. Selfridge, who, being duly sworn according to law, doth declare and say that the following goods and chattels, to wit, twelve curtains of the value of three hundred dollars and —— cents,
9 —— of the value of —— dollars and —— cents
—— of the value of —— dollars and —— cents
—— of the value of —— dollars and —— cents
—— of the value of —— dollars and —— cents
—— of the value of —— dollars and —— cents
all lawful money of the United States, of the goods and chattels of said Thomas O. Selfridge, have, within two hundred days last past, by some person or persons unknown, being feloniously stolen, taken and carried away out of possession of the said Thomas in the District and County aforesaid, and that the said Thomas hath probable cause to suspect and doth suspect, that the said goods and chattels are now concealed in the premises of one Rachel Brown and Mary Levy known as number 717 8 St., N. W., in the city of Washington in the said County and District.

THOS. O. SELFRIDGE.

Subscribed and sworn to before me this 26 day of Dec., A. D. 1907.

L. F. ENGLESBY,
Deputy Clerk, Police Court, D. C.

10 Endorsements on the back of the foregoing complaint:
No. 70393. Affidavit of Complainant. Larceny and Search. United States *vs.* Rachel Brown, Mary Levy. Complainant: Thomas O. Selfridge, 1867 Kalorama. Dec. 26, 1907.

In the Police Court of the District of Columbia.

Aff. No. 70393.

DISTRICT OF COLUMBIA,
County of Washington, ss:

To the Major of Police of the District of Columbia, Greeting:

Whereas, it appears by the information and oath of Thomas O. Selfridge that the following goods and chattels, to wit:

twelve curtains of the value of three hundred dollars and —— Cents
—— of the value of —— dollars and —— cents
—— of the value of —— dollars and —— cents
—— of the value of —— dollars and —— cents
—— of the value of —— dollars and —— cents
—— of the value of —— dollars and —— cents

all lawful money of the United States, of the goods and chattels of said Thomas O. Selfridge, have, within two hundred days last past, by some person or persons unknown been feloniously stolen,
11 taken and carried away out of the possession of the said Thomas O. Selfridge in the District and County aforesaid, and that the said Thomas O. Selfridge hath probable cause to suspect, and does suspect, that the said goods and chattels are now concealed in the premises of one Rachel Brown and Mary Levy, known as number 717 8th Street, N. W. in the city of Washington in the County and District aforesaid.

These are, therefore, in the name of the United States to authorize and require you, with the necessary and proper assistance, to enter in the day time, into the said premises and there diligently search for the said goods, and if the same or any part thereof shall be found upon such search, that you bring the goods so found and the bodies of the said Rachel Brown and Mary Levy before the Police Court of the District of Columbia to be disposed of and dealt with according to law.

Witness the Honorable Ivory G. Kimball and the Hon. Alexander R. Mullowny, Judges of the Police Court of the District of Columbia, and the seal of said court this twenty-sixth day of Dec. in the year of our Lord one thousand nine hundred and seven.

[Seal of Court.]

L. F. ENGLESBY,
Deputy Clerk of the Police Court, D. C.

Endorsements on the back of the foregoing warrant:

No. 156303. U. S. Search Warrant, to search premises of
12 Rachel Brown and Mary Levy, 717 8th St. N. W. Search made and nothing found. —P. M. J. W. Greene, M. P. Nolle Prossed. Ralph Given, Ass't U. S. Att'y, D. C. Jan. 11, 1902.

Docket Entries.

156,303.

UNITED STATES
vs.
RACHEL BROWN, MARY LEVY.

Warrant for Search. Nollepros Entered by Ass't District Attorney with the Consent of the Court.

To further maintain the issues on her behalf joined, plaintiff produced as a witness Mrs. MARY LEAVY, who testified that she had

known the plaintiff, Miss Brown, for 13 or 14 years; that on the 26th of December, 1907, and for a short time prior thereto, she was stopping with Miss Brown, who was running a boarding house, at 717 8th Street, N. W.; that between 10:30 and 10:45 in the morning of that day she was in the parlor at the house of Miss Brown, making the beds; that two men rang the bell and the colored girl answered; that she went to the door leading to the hall, and the men came right in and asked to see Rachel Brown; the colored girl called Miss Brown, who was in the basement. Miss Brown came up, and then they asked for Mrs. Leavy. This happened in the hall. Miss Brown said, "Gentlemen, walk in" inviting them into the back parlor; then the first two walked back and the admiral (the defend-
13 ant) and another came in behind and followed them. When they got into the back parlor one of the men, whom witness thinks was Detective Owens, said, "Is this Mrs. Leavy"? Witness replied, "Yes, sir, but you have got the best of me." He said, "Have you got a trunk." Witness replied, "I have no trunk." He said, "You have no trunk." Witness said, "Do you mean my packing trunk. All the trunk I have is downstairs in the hallway in the basement." He said, "you get in front of me." Witness asked, "What does all this mean, I would like to know what it is all about." Then they marched witness and Miss Brown down ahead of them. In moving her trunk witness had lost her key. Owens or one of the detectives said to witness after they had gone down to the hallway where the trunk was standing, "Open that trunk." She replied, "Unfortunately, I have lost my key." They had never told witness nor Miss Brown yet, that they were detectives. He again said, "You open that trunk, or I'll put the trunk in the patrol wagon and you on top of it." Witness replied, "Break it open, I haven't got the key." He said, "You open that trunk or I'll put the trunk in the patrol wagon and you on top. You break it open." Witness got a hatchet and broke it open. That she would not have done this if she had not been threatened. They *they* took piece after piece out, unpacking the trunk. Admiral Selfridge was there all the time and remained with the three detectives until they left the house. Admiral Selfridge stood over the trunk. It contained dishes and various trinkets belonging to herself and her daughter. They took them all out and just threw them aside; they left everything
14 in a mess; dishes on the dining-room table where the boarders were ready to come in to lunch. Witness said, "O, isn't this awful. It is near lunch time and the boarders will soon be here," and one of the detectives said, "Boarding house,—is this what you call a boarding house?" Witness replied that it was, and that he had better be careful how he made such remark*d* in front of ladies; that he was talking to ladies and not to the scrub of the town.

That they went from the hall into the dining room and searched every nook and corner, including the closet; the Admiral was there all the time, step by step, and saw every article that was handled. From the dining room they went to the kitchen and searched every hole and corner there. Dishes were taken out of the closets in both rooms and placed on the tables, chairs, and on the floor. Then they

went to Miss Brown's bedroom, which was the back parlor and which was made into the reception room, and searched everything in there; every bureau and chiffonier drawer; her trunk from the top to the bottom, the closet, and everything that could be searched. They did not replace any of the things; the whole house was in a mess from top to bottom. Then they went to the parlor, which was a bedroom, searched every place there, ransacking everything. Then they went to the second floor, which would be the third floor from the basement, comprising two rooms, and searched everything there, and the bureau drawers; lifted the bedclothing and searched all the boarders' trunks, and examined the feather pillows. Then they went to the third floor, comprising three rooms, and searched all of them.
15 They searched all the trunks they came to. Nothing was left untouched. The Admiral was with them all the time. And all the time they kept witness and Miss Brown in front of them. Miss Brown was almost ready to faint. The detectives kept calling her "Rachel Brown." She said, "Look here, I am not Rachel Brown to you; you call me Miss Brown or call me nothing." He said "Look here woman, one more word out of you and I'll take you down in the patrol wagon." Witness made Miss Brown sit down once; she looked as if she was going to faint. Her lips turned just as blue as ink. That the men did not say they were detectives and did not show a warrant or any other authority. After they had finished searching the house Detective Owens said, "Miss Brown, I haven't hurt you." She said, "No, but you have hurt me here" (pointing to her heart).

After they went witness put Miss Brown to bed, she was so sick, and telephoned for Dr. Purdy. Miss Brown was complaining of a suffocating feeling; could not get her breath, and was sick in the stomach; her head was throbbing and aching. The doctor came that night.

That the detectives did not seem to find what they wanted.

Witness further testified that she knew the reputation of the plaintiff for honesty and integrity, and that it is good.

On cross-examination witness testified that she was not at present living with plaintiff, but that she was living with her at 717 8th Street in December, 1907, and had been living there since Novem-
ber 13, 1907; that she continued living there until some time
16 in the early spring of 1908. That prior to this period she had not lived with Miss Brown, but she had seen her almost daily. That her acquaintance with Miss Brown was as friends and she does not remember whether she ever had any business transactions with her. That she did not need to inquire as to whether Miss Brown was honest or otherwise but as the general public she never had known anything but honesty of her; has known her to live at places for years and years, and naturally it would be thought she was all right or they would not keep her. That the plaintiff had been with the Admiral (the defendant) for about nine seasons. Miss Brown was the proprietress of 717 8th Street, and witness and her little girl were there as friends. This occurrence happened between ten and eleven o'clock in the morning; at this period of time Miss Brown had from eight to twelve boarders. 717 8th Street is on the

east side of 8th Street between G and H Streets; it is four stories high including the basement; the basement comprises a dining room in front and a kitchen in the back. On this occasion the dining room was furnished with a dining table, chairs and a small serving table; an entrance was effected to it from a hall; that coming down stairs to the basement to get into the dining room you would enter a little hallway between the dining room and kitchen, and the trunk was in that hallway; that space was just about large enough to put the trunk in. That the trunk had been in storage at Baum's on the Avenue and about the st of December she moved it to Miss Brown's house; prior to that time the trunk was at her home at 1602 8th Street; that the trunk remained in the same condition as to contents after it got to Miss Brown's hou-e as before; it had not been
17 opened. When the bell rang on the 26th of December, 1907, she was in the parlor, which is the first room over the dining room; there was a hall alongside corresponding to the hall in the basement; Miss Brown at the time was down stairs; the colored girl who was a servant in the house opened the door; Mr. Owens and his assistant came in; the other two men were back a little ways; witness did not see them at the time, but they asked for Rachel Brown; witness stepped to the parlor door and remained silent. The girl called Miss Brown; that she first saw the four men in the house as she stepped in the reception room which was the back parlor occupied by Miss Brown; the servant went down stairs; that when they were all in the room Owen said to her: "This is Mrs. Leavy?" and she said "Yes, sir. Gentlemen you have the advantage of me," and he replied "Where is your trunk?" Witness said "Gentlemen what does this mean?" He said "You will know before we get through." Witness said "If it is my trunk you want I have no trunk with wearing apparel, but my packing trunk is in the basement; if you want to see that go down and look at it." He said: "No, I will not go down." He said to both of us: "Get in front of us and show us the trunk." That witness and Miss Brown both went down together in front of these men. Owens pulled the trunk out from the little hallway and told witness to open it; when the trunk was opened the till was in the dining room, and the trunk itself remained in the hall; it may have been carried into the dining room but witness is
18 not positive. Owens demanded the key; witness told him that she had lost it. They demanded a third time for the key; Owens told her to break the trunk open and witness said "I have not the strength to break that trunk open;" Owens told her to get it open or he would put her on the trunk and take both to the station house in the patrol wagon; she then got the hatchet and gave it to him, and told him there was a hatchet; break it open. He told witness to break it open herself and she told him she did not have the strength to do so. Whereupon Owen told her to do as he said or he would put her on the trunk and both in the patrol wagon and take them to the station house; that she opened the trunk herself under a threat. After the trunk was opened the tray was taken out and carried into the dining room; that they unwrapped the articles in it and put them everywhere, some on the floor; the trunk contained cups and

saucers, vases and plates and dishes, knives, forks and glasses, and little trinkets belonging to her little girl, Christmas cards, picture books and valentines; and these articles were strewn on the floor and table. They searched the dining room by going through the closet and taking out all the dishes and looking at them; these dishes were placed all around the floor and on the tables; they also took out everything else that was in the closet including bread and cake boxes; they looked under the table, took up the table cloth and looked at it. They did not tell her what they were looking for. That they went from the dining room to the kitchen and did the same thing, marching Miss Brown and herself in front of them all the time, saying "Miss Brown you and Mrs. Levy go in front," and "show us
19 the kitchen." They searched two pantries which contained iron boards, iron holders and ordinary kitchen furniture and utensils; they took everything out of the closets and put them around on the floor and tables. They went from the kitchen to the second floor, the main floor of the house. They searched Miss Brown's sitting room; they searched a closet there and took out all of her clothing and hat boxes in the closet, throwing them over the chairs and on the floor; they searched everything that the room contained, bureau drawers and her trunk; that she does not remember volunteering to say to the officers at any time that there was nothing in that house that belonged to them. Witness did not know what it all meant; the officers never read a warrant or anything; she did not state to the officers that there was nothing in the house that belonged to her except the trunk; she was scared to death and did not think of anything like that.

They then went into the parlor which was made into a bed room, and searched everything, the closet, bureau and beds, taking the things out; that after the officers searched the rooms they left all the articles scattered around. They went to the third floor, front room and searched everything that was in it, the whole bedroom suite, bed, bureau, washstand, closet, drawers and two trunks in there belonging to roomers and two dress suit cases; that she or Miss Brown made the remark to the officers that the things belonged to roomers; they took all of these things out. They searched that entire floor, opened the bureaus and washstands and opened trunks and suit cases. Then they went to the last floor which com-
20 prised three rooms and did the same thing, opening trunks, dress suit cases, bureaus and closets, and taking the things out and leaving them indifferently on the bed, the chairs and the floor. All of this time Admiral Selfridge was along looking at everything. After they searched everything they seemed to be a little disappointed, both the Admiral and the men, and one of them, Owens, shook hands with Miss Brown and said "Miss Brown, we have not hurt you," and she said "Yes, you have hurt me; you have hurt my heart, and you have hurt me physically; I will never get over it." The officers then went away and left everything as it was, and Miss Brown and witness were left to put them back. Mr. Owen and she thinks, Mr. Green, were very abusive; in the first place, by telling two lone ladies without any protection that they

would put them in the patrol wagon and take them to the station house because they did not have a key to a trunk; by addressing Miss Brown as Rachel Brown all the time, and by telling her that if she did not shut her mouth he would put her on the trunk with witness and take her to the station house. They were very abusive in their actions all the way through. Miss Brown was not acting resentfully toward the officers and did not create something of a scene; she was frightened as any woman would be. Neither witness nor Miss Brown said "We know why you have come here" or anything like that. In point of fact they did not know why the officers came there until after they got through. That from start to finish what she and Miss Brown did was in submission to the exactions of the officers and because they were in fear of them. That she and Miss Brown left the house sometime in the early spring of 1908.

21 That she called the doctor for Miss Brown on three occasions that she can remember; twice while Miss Brown was at her house, that she did not see the doctor actually attend her except on the day that the detectives were at the house. Witness did see her at the doctor's office once. Witness further testified that her husband is still living but that they are not living together. Witness was further questioned, as follows:

Q. Mrs. Levy, one other question which I regret the necessity of asking. Is it not a fact a suit for divorce is pending between you and Mr. Levy and that Miss Brown has testified in that case as a witness on your behalf?

To which question counsel for the plaintiff objected, on the ground that it was irrelevant, immaterial and not proper cross-examination, but the court overruled said objection, to which action of the court plaintiff then and there excepted, and said exception was then and there noted upon the minutes of the Court.

A. Yes, sir.

On redirect examination witness testified that at the time this happened Miss Brown looked as though she was ready to faint; her lips were as blue as ink, and she was as white as could be; witness took hold of her and said "Sit down, Miss Brown." The detectives and the defendant had no more than gotten out before Miss Brown came near fainting; witness grabbed her and assisted her to the couch and put her to bed and then went on G Street to a jewelry store and 'phoned for a physician. He came and administered to

22 Miss Brown and told witness it was her heart. Miss Brown was very sick, suffering as if she would lose her breath. She was in pain. After the doctor had gone she had to call him that night. Witness went to his office time after time to get the medicines changed for Miss Brown. Prior to this time she never knew Miss Brown to have a sick day in her life. That at the time of this occurrence the table in the dining room was partly set, and the balance of the table had dishes on it to be set. That Miss Brown occupied the back parlor which was made into a bedroom; it was

sitting room and bedroom combined, and that was one of the rooms earched. They searched the trunk and bureau and broke a key in etting the trunk open. Witness further testified that Miss Brown as a witness in the divorce suit. Thereupon the witness was ques-oned with reference to the divorce suit, as follows:

Q. I will ask you whether or not in the cross-examination of Miss rown she was asked if she had not had herself accused of robbery stealing, and had her premises searched at one time; to which uestion counsel for the defendant objected. Counsel for the plaintiff ated that the question was propounded because the witness had been ked on cross-examination about this divorce suit, and about the aintiff testifying as a witness in her behalf. That he wanted to ow that when Miss Brown was put on the stand they undertook to tack her character because she had been accused of stealing and a arch warrant issued and her premises searched. But the court stained said objection, to which action of the court counsel for the plaintiff then and there excepted, and the court then and there entered said exception upon its minutes.

Thereupon to further maintain the issues on her behalf ined plaintiff offered as a witness Dr. O. A. PURDY, who testified at he was a physician and had been practicing medicine for about enty years; that his office was at 1310 I Street, Northwest. That was called by 'phone about eleven o'clock on the 26th of Decem-r, 1907, and requested to go to the house of Miss Rachel B. Brown 727 8th St., N. W.; that he went and found Miss Brown in a mplete nervous collapse as the result of a certain amount of heart lure; that she was shaking from head to foot; that he admin-ered to her by prescribing sedatives for the nerves and stimulants the heart; that he had been her physician for years, and prior this occasion she had been in robust health. In answer to a hypo-tical question he testified that the condition he found Miss Brown on this occasion positively resulted from the effect of the search de of her house. That Miss Brown had paid him in cash on ac-nt of subsequent treatments required because of her said illness, out thirty dollars, and that she owed him about twenty-five dollars the same account.

To further maintain the issues on her part joined plaintiff pro-red as witnesses Mr. FRANK L. HOOD, who had known her about rteen years, Mrs. ELLA B. HOOD, who had known her about nty-five years, Mrs. VIRGINIA D. GERDES, who had known her ut thirty years, Mr. ROBERT LEDING, Mr. SAMUEL ROSS, and Mr. CHARLES A. MORGAN, all of whom testified that they knew Miss Brown's reputation for honesty and integrity, and that it was good.

Thereupon to further maintain the issues on her behalf joined, intiff took the stand herself and testified that she knew the de-dant Admiral Selfridge, and had been employed by him for about e or ten years, prior to the spring of 1907; that she acted as his k and housekeeper after his wife died; that she did the marketing l attended to different things about the house; that Mrs. Selfridge d about two years before witness left there.

Thereupon the witness testified as follows:

Q. Did you ever handle any money of Admiral Selfridge? A. I did.

Q. To what extent? A. Well, the market money; he has allowed me to draw money at the market—from the cars to the farm.

Q. You spoke of being housekeeper. What were your duties in that connection? A. Well, I opened up the house in the fall and sometimes would be there three or four days or a week before they got in.

Q. Anybody there with you? A. Sometimes there was and sometimes there was not.

Q. Who had charge of the house during the time you were there? A. Mrs. Selfridge was her own housekeeper when she was living.

Q. When you went there and opened the house up some-
25 time before the Admiral came, who had charge of the house? A. I had charge of the house.

Q. House all furnished? A. Yes, sir.

Q. During what period of time did that continue? A. In the fall after they came home.

Q. How long a time? A. Sometimes a week and sometimes three or four days.

Q. How often did that happen? A. Every year. Only one year I was with him we all went to Jamestown but came home together.

Witness further testified that she left Admiral Selfridge because she intended to open a boarding house. That she occupied the back parlor on the first floor from the front street, or second floor from the basement of 717 8th St. She opened the house sometime in August, 1907, and stayed there until April 1st, 1908. On the 26th of December, 1907, the door bell rang and the colored girl went to the door and admitted two men; just as she entered the stairs one of the detectives, and the Admiral and another detective came in; she said to the Admiral, "Why, Admiral, what do you want in here?" and shook hands with him, but he never said a word. They asked witness where her room was and she took them in and they asked for Mrs. Leavy; she called Mrs. Leavy, who came forward and they all went into the room together, and they asked Mrs.

Leavy where her trunk was, and she said "What trunk? I
26 haven't any trunk," and they said "The trunk you have in storage," and she said "It is down stairs in the front hall." They told her to go down to it and Mrs. Leavy said "You go down in front of me," and they took hold of witness by the arm and pulled her in front with Mrs. Leavy and started them down stairs together; when they got there the detectives demanded the key to the trunk and Mrs. Leavy said "I have not any key; in moving and the excitement I lost the key." Mr. Owen said to her "You open that trunk or I will set both of you on that trunk and take you to the station house." Mrs. Leavy called the girl and got the hatchet from her; she offered it to the detectives to open the trunk with, but they demanded her to open it, and she refused. She said "Gentlemen, I am sick this morning and don't feel very well and

can't open that trunk." They demanded her again to open the trunk, or they would put her on the trunk and take her to the station house. She took the hatchet and broke it open. They then moved it into the dining room, and everything was taken out; they threw things all over the floor; they could not put anything on the dining room table, because it was set; they put them all over the serving table and went into the closet and pulled everything out they could get their hands on, and went from that room leaving those things right there, into the kitchen, and went through everything in there. They made witness and Mrs. Leavy march in front of them back upstairs and into witness' room; they went into the front bedroom; searched the bureau and opened the trunk of the gentlemen who were at work. Then they went into witness'
room and opened two trunks and two bureaus she had in
27 there and pulled out her underwear and held it up in every
way; they went through everything she had, including her washed clothes that were put away for the summer. From there they went upstairs to the second story front room and demanded the trunk there opened. Witness told them she could not open the gentleman's trunk because he was at work. One of the detectives said "give me the keys." They tried all the keys they had. Witness told him she would go down and get the key out of her trunk which they left hanging in the trunk and Detective Green said to Owen "You go down with her." She said: "If I have to be escorted down there with you, I will stay up here. Let Owens go by himself." And Johnson went down and got the keys. Admiral Selfridge was right there. Detective Green was very abrupt to her. He called her "Rachel," and she told him not to call her Rachel any more; to call her Miss Brown or nothing. He pointed his finger in her face and said "My lady, one more word from you and I will put you in the patrol wagon." They went from the second to the third floor and opened the men's trunks, dress suit cases, satchels, and everything they could find.

Witness further testified that it was near twelve o'clock when the detectives and the defendant called and were in the dining room, and she said "My, my, look here, all this to be done and the boarders will be coming in for lunch," and Owen said "A boarding house! Is this what you call a boarding house!" That the actions of the detectives and the defendant made her very nervous and affected her heart; she had to be treated by the doctor and he attended her
all summer. The doctor called to see her at two o'clock
28 on the 26th of December and at night again. She opened
this house where she lived with her life savings. Prior to this time she had been in the best of health. Since she had been compelled to have the doctor right along; that he had to give her medicine the day prior to her testifying, and she had to go to see him that night. That she did not suffer in that way before this experience.

Thereupon witness testified as follows:

Q. These different calls that you made upon the Doctor and that

the Doctor has been called upon to make on you since, what was the occasion of that; what were you suffering from? A. The same, he said.

Witness further testified that she paid the doctor between thirty and thirty-five dollars in cash, but does not know how much she owes him still. Thereupon the witness was asked the following questions?

Q. Did this trouble have any effect on your boarders?

Mr. DAVIS: Objected to.

The COURT: I don't think there is any special damage in there.

Mr. LAMBERT: I think there is. I think I alleged it in the declaration.

The COURT: I suppose he refers to her business.

Q. On your business of keeping boarders?

And the court sustained said objection, to which action of the court in sustaining said objection counsel for the plaintiff then and
29 there noted an exception which exception was duly entered upon the minutes of the court.

Witness further testified that this occurrence made her sick, and that she was rendered unable to attend properly to the boarding house and finally had to give it up. That she did not know what they were searching for until a week after that when she went to see the butler and he told her. That she had not taken anything from Admiral Selfridge, or from his house, and had not been accused of stealing or taking anything of that kind before.

On cross-examination witness testified that the search was made against her will by these officers, and that she did not know what they were there for and they did not tell her; that she did not tell them she knew what they were there for; that she did not assist them in making the search at all; and that she was made so ill by the matter that she had to have the doctor every day for some days after; that she was confined to the house for a few days, about five days, and most of the time was in bed; that for three or four days she was unable to attend to anything and Mrs. Leavy did the marketing. The first article searched was Mrs. Leavy's trunk. Witness thereupon testified in response to questions put by counsel for the defendant that she remembered reporting that an ebony black hair brush and ebony frame mirror, a sterling silver comb and two towels had been stolen from her house; that they were stolen on the 26th of December, but she did not know whether they were stolen while the detectives were in the house or after they were gone. She made the complaint at the station house on 12th St.; she saw the
30 Captain and had an interview with him of about ten minutes; that Mr. Stanton, the gentleman who lost the articles went to the station house to report the robbery on the 28th of December, and witness thinks she went the following week. She went on the same day that she went to the market. She does not remember whether it was in the daytime or nighttime. That they had a suspicion as to who took the articles; two men that were rooming there

epresenting themselves as father and son who said they came from oston.

Thereupon the plaintiff rested.

This is the substance of all the evidence offered on behalf of the laintiff.

This is the substance of all the evidence taken in the case.

Thereupon counsel for the defendant moved the court, upon the idence adduced, to direct a verdict in favor of the defendant.

The COURT: Gentlemen, this question is to my mind a very in-resting one, and I am very frank to say, a very close one. Now he proof in this case shows that the plaintiff had lived with Admiral lfridge for some years and had left him to go to housekeeping her-lf; that after the return of the Admiral from his summer vacation, discovered that there were certain goods missing from his house, nd thereupon he makes an affidavit before the police court officials the effect that certain goods had been stolen from his premises by some person or persons unknown. In other words, he makes affidavit that these goods had been stolen; who stole them he does not know, but he believes them to be or has robable cause to suspect and does suspect that the said goods and attels are now concealed in the premises of the plaintiff and this her lady. The goods were stolen, and he does not know who stole em, but he has reasonable and probable cause to suspect that they e on the premises of this plaintiff and some one else; and on the rength of that affidavit, this warrant is issued, which goes to the tent of requiring the searching of these premises, and, in the event at they shall be found upon these premises, in that event these rties whose house had been searched are to be apprehended.

Now they were searched and nothing was found, therefore that rt of the direction, to apprehend these parties in case the goods ere found, was not effective, because nothing was found, conse-ently there was no arrest made, and subsequently whatever action s brought—I do not know what form the action is; it does not em to have been shown to the court, I mean as to what was the sis of the suit by the United States against these parties. There es not seem to have been any information. So they seem to have opted something else. United States against these parties, that all I understood was done, and there is no charge in that case, ere is nothing to show that anything had been done under it; no der for an arrest, and consequently, I do not know what it was, d therefore there is nothing before the court to show what that was—simply a suit docketed, that is all. Now then, what-ever it was, it seems to have been nolled, a nolle pros. entered in it, and as I have said, there is nothing before the court to ow the institution of any criminal action. So that, after nothing s found, then whatever that thing was, was dismissed.

Upon that condition the plaintiff sues the defendant in this cause malicious prosecution, and the malicious prosecution is based on this search warrant that was issued. That being so, it is en-mbent upon the plaintiff, not only to prove the institution of the

proceedings, but that by virtue of it, the party was finally discharged, and that there was no further prosecution; and also the additional and important items—because anything seems to be a discharge according to some of the authorities—but the gist of the action is the want of probable cause. Now although it is negative, the plaintiff must prove the want of probable cause on the part of the defendant in this cause in instituting that search warrant; and in addition to that, she must show malice.

Now when we come to this case of Spitzer *vs.* Friedlander, I may say to counsel that they have misapprehended the case. The plaintiff did rest upon proof of the trial and discharge not guilty, and so on; but in the proof of the case, all the circumstances under which the party had been arrested were disclosed in the cross-examination, and therefore the court did not err on the question that there was a failure of proof of want of probable cause; but from all the circumstances in the case, they ruled that the evidence in the case brought out under cross-examination and so on, showed
33 that there was probable cause. It was not ruled out on the ground that this would not show the want of probable cause, but all this testimony having been brought out, it showed there was probable cause for the arrest, and that being a question of law, the court held that when the plaintiff was arrested he was properly arrested, by reason of the fact that there was probable cause. If there is probable cause, it does not make any difference how much malice there may be in the case, or what the motive is in having the man arrested. No matter how much harm is done, if there is probable cause for it, it is *damnum absque injuria*. So that this case does not take the positon that counsel thought it did.

Now what is probable cause? As counsel for both sides have stated there are hundreds and hundreds of cases on the point, and the definition of Mr. Justice Washington, I suppose, has been more frequently quoted than any other; but this authority says:

"Probable cause for a criminal prosecution lies in the existence of such facts and circumstances as would reasonably excite belief in the mind of an ordinarily cautious man, acting on the facts and circumstances within the knowledge of the prosecutor at the time, that the accused was guilty of the crime charged.

Now that is what probable cause is. The want of it, of course, is the converse of it.

In this case the testimony shows that the affidavit was made, warrant was issued, and then they went to the house. The
34 proof of the plaintiff negatives anything like express malice or any personal malice, and if there is any malice in this, it is malice in law, and not any other kind of malice, because the plaintiff has said that when Admiral Selfridge came there, she shook hands with him, and asked him "What brings you here, Admiral?" or something of that kind. So up to that point there is no evidence in the case of any express malice, and if there is malice at all, as I have said, it must be inferred by law. Now the

proof, therefore, of the malice and the proof of the want of probable cause in this case rests upon this theory that the plaintiff has shown a good character. Personally, I cannot see the difference between showing it and presuming it, because the showing can be denied just as well as the presumption can be rebutted. Consequently I do not see that there is any difference in that—the mere fact that that there has been produced before the court the evidence of certain people who have testified as to the general reputation, and in this case, as is nearly always the case, it amounts to the fact that the reputation has never been discussed, and that is the way it always turns out as a rule. That being so, does that, in connection with the fact of presuming that Admiral Selfridge by his long intimacy with this plaintiff, through the fact that she had been in his employ so many years—presume that he knew it or not however—that in view of that he proceeds to make an affidavit that his goods have been stolen; he does not know who stole them; but he has reasonable and probable cause to suspect that they are in the house of this plaintiff and this other lady. In that condition, the plaintiff rests, and says that the proof of the discharge or nolling of the case and the proof of good character, carries with it *prima facie evidence of the want of probable cause and malice.*

Now probable cause for a criminal prosecution lies in the existence of such facts and circumstances as would reasonably excite the belief in the mind of an ordinarily cautious man, acting on the facts and circumstances within the knowledge of the prosecutor at the time, that the accused was guilty of the crime charged. So that the fact that this plaintiff had a good character, and that is all we have in the case, carries with it the burden of proof on the part of the plaintiff; and that the proof of good character negatives, *prima facie*, the idea that Admiral Selfridge had before him such facts and circumstances as would reasonably excite the belief in the mind of an ordinarily cautious man, acting on the facts and circumstances within the knowledge of the prosecutor at the time, that the accused was guilty of the crime charged. So that the proof of good character standing alone is proof of all the ingredients of probable cause, and therefore, he, knowing that this plaintiff had good character, that fact is sufficient to show to the jury, that because he knew she had a good character, that he was not in possession of any facts and circumstances which in the case of an ordinarily cautious and reasonable man would make him believe that she had committed this crime.

Now I am constrained to think that that is further than any good character has gone before. Proof of good character in any criminal case is only a fact to be considered by a jury, according to the Supreme Court, like any other fact in the case. It is no more; it is no less. It is a fact, and therefore it seems to me it is a fact here that they had the right to consider. But does it go to the extent of showing that the plaintiff in this case has shown sufficient to put the defendant upon proof that he had no facts and circumstances before him which would make a reasonably cautious

man believe that the person who was charged was guilty of the theft. I cannot think it possible.

As I have said, it is a very interesting question. It is the extreme of any question I have ever seen before. I am frank to say that this case in the Minnesota Reports certainly upholds the position of Mr. Lambert but I cannot agree with the reasoning:

"The court then dismissed the action. We think that the proof made a *prima facie* case of want of probable cause, from which malice might be inferred, and that it was error to take the case from the jury. It is true that the burden was upon the plaintiff to show that the proceeding was instituted by the defendant without probable cause and with malice. But in such a case, it must often be that the only proof possible from the plaintiff is of a negative character, and in reference to matters peculiarly within the knowledge of the defendant; and hence less satisfactory and convincing proof is required of the plaintiff to shift the burden on the defendant than would otherwise be necessary."

That seems to me to be arguing in a circle. It says that
37 you are to prove a negative, but inasmuch as it is difficult to prove a negative, you don't have to prove it as you would have to do in other cases. I do not understand the law to be that. I understand the law to be that it is just a case like any other case; that when the burden is upon you, you must establish that burden and because it is difficult to establish it, does not overcome or change the rule of law.

Of course, it does harm to a person to have their house searched, I suppose, and unquestionably there must be a remedy for it, where it is malicious and without probable cause. But the difficulty is not with the principle or the right of recovery, but the difficulty so often comes from the securing of proof of it; and because it is difficult to prove, does not change the rule of evidence. Now there may have been other facts, taken in connection with these facts, would have been sufficient to take it to the jury, from which there could be inferred this malice. But it does seem to me that in a case like this where the only malice proved, if any at all—the proof being anything but express malice in this case—and therefore the only malice in the case is legal malice, which is to be inferred and the want of probable cause to be inferred by reason of good character, you are building an inference upon an inference, if the good character proves the want of probable cause, and if there were want of probable cause, then malice may be inferred. It seems to me that that is taking it a long ways from the position which the law takes, that there shall be affirmative proof both of the want of probable cause and of malice,

malice being possible to infer from the want of probable
38 cause.

Now, gentlemen, this is one of those cases which I regret that my finding is as it is; I should always sooner have these cases settled by a jury; but it became incumbent upon the court to pass upon the question, and it does seem to me that the best judgment I can give this case is that the requirement of the law that you shall

prove affirmatively a given thing has not been met in this case, and I therefore must instruct the jury to find in favor of the defendant.

Mr. LAMBERT: We, of course, note an exception to the instruction of the court.

The COURT: Yes.

Mr. LAMBERT: May it please the court, I do not suppose it would be any use taking up the time of the court with a motion for new trial. I would like to note an appeal in open court.

The COURT: Then you consent to have the judgment entered at once, and then an appeal from the judgment.

Mr. LAMBERT: And I ask Your Honor to fix the cost bond?

The COURT: I suppose about $50.00.

And all of the exceptions hereinbefore referred to were noted on the minutes of the court as they were severally taken, and the plaintiff prays the court to sign this bill of exceptions, to have the same force and effect as if the rulings herein contained were set out in separate bills of exception, which is accordingly done this 26″ day of March, 1909, *nunc pro tunc*.

HARRY M. CLABAUGH,
Chief Justice.

Settled by consent
WILTON J. LAMBERT,
For Plaintiff.
HENRY E. DAVIS,
For Defendant.

39 *Directions to Clerk for Preparation of Transcript of Record.*

Filed March 27, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 50359.

RACHEL B. BROWN, Plaintiff,
vs.
THOMAS O. SELFRIDGE, Defendant.

John R. Young, Esq., Clerk Supreme Court of the District of Columbia:

Please include in the transcript of record for the Court of Appeals in the above entitled cause, the following pleadings:

1. Declaration and notice to plead.
2. Defendant's plea.
3. Joinder of issue.
4. Verdict of jury and copy of judgment thereon.
5. Memorandum showing the giving of bond for costs and appeal.
6. Bill of exceptions and order making them of record.

WILTON J. LAMBERT,
RUDOLPH H. YEATMAN,
Attorneys for Plaintiff.

40 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 39 both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed copy of which is made part of this transcript, in cause No. 50359 At Law, wherein Rachael B. Brown is Plaintiff and Thomas O. Selfridge is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 14th day of April, A. D. 1909.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 2008 Rachael B. Brown, appellant, *vs.* Thomas O. Selfridge. Court of Appeals, District of Columbia. Filed Apr. 15, 1909. Henry W. Hodges, clerk.

No. 2008.

RACHAEL B. BROWN, Appellant,
vs.
THOMAS O. SELFRIDGE.

TUESDAY, *November 2d, A. D.* 1909.

The argument in the above entitled cause was commenced by Mr. R. H. Yeatman, attorney for the appellant, and was continued by Messrs. J. Holdsworth Gordon and Henry E. Davis, attorneys for the appellee, and was concluded by Mr. W. J. Lambert, attorney for the appellant.

No. 2008.

RACHAEL B. BROWN, Appellant,
v.
THOMAS O. SELFRIDGE.

Opinion.

Mr. Justice Robb delivered the opinion of the Court:

This case comes here on appeal from a judgment for appellee, in the Supreme Court of the District, on a verdict directed by the court.

On the 26th of December, 1907, appellee, defendant below, appeared in the Police Court of the District and made oath that "twelve curtains of the value of three hundred dollars * * * of the goods and chattels of said Thomas O. Selfridge, have, within two hundred days last past, by some person or persons unknown, being feloniously stolen, taken, and carried away out of possession of the said Thomas in the District and county aforesaid, and that the said Thomas hath probable cause to suspect and does suspect, that the said goods and chattels are now concealed in the premises of one Rachael Brown and Mary Levy, known as number 717 8th street N. W., in the city of Washington in the said county and District aforesaid."

Thereupon, on the same day, a search warrant was issued by said court and a search made of the aforesaid premises by three officers of the law, accompanied by appellee. The alleged stolen goods were not found and the cause, which had been docketed in said court, was nolle prossed in due course.

On March 17, 1908, appellant brought this suit against appellee for malicious prosecution, her declaration being based upon the foregoing recital of facts. At the trial appellant testified that she knew Admiral Selfridge, the appellee, having been in his employ for nine or ten years prior to 1907; that after the death of his wife, which occurred two years before she left his employ, she acted as cook and housekeeper, did the marketing and attended to different things about the house; that she was sometimes entrusted with market money by appellee and, in the absence of the family, often had charge of the house; that she left his employ to open a boarding

house, where she remained from August, 1907, to April, 1908; that on the day of the search she met Admiral Selfridge as he was entering her house with the officers, saying to him: "'Why Admiral, what do you want in here?' and shook hands with him, but he never said a word."

The foregoing negatives the existence of express malice on the part of the appellee; hence if malice be shown it must obviously be implied, that is, malice in law.

To entitle a plaintiff to maintain an action for malicious prosecution three elements, aside from all questions of special damage, are necessary, viz., termination of the previous suit, want of probable cause, and malice. As there is no controversy as to the termination of the previous suit that element is not in issue here; and as plaintiff must show malice, if at all, by inference, that is, from want of probable cause, it is self-evident that want of probable cause is the single element here to be considered.

It appears from the record that Mary Levy, whose name was joined with appellant's in the affidavit of appellee on which the search warrant was issued, was, and for some time prior thereto had been, living with appellant on the date of the search. Appellant testified that she had never taken anything from Admiral Selfridge, or from his house, and had not been accused of stealing anything of that kind before; but Mrs. Levy never denied taking the goods, and at no time during the trial was it denied by either appellant or by Mrs. Levy that the goods had never been on the premises.

To meet the burden of showing want of probable cause appellant offered in evidence the testimony of several witnesses to the effect that she had previously borne a good reputation for honesty and integrity. This evidence, appellant contended, established, prima facie, the want of probable cause, and that the burden of proof then shifted to appellee. The court ruled that appellant had not met the burden of showing want of probable cause and, therefore, without hearing appellee, directed the jury to return a verdict for him. Appellant's assignment of error is that "the court erred in directing the jury to return a verdict in favor of the defendant, appellee."

The burden of showing want of probable cause was sustained by appellant, if at all, by the evidence of previous good reputation thus introduced; but we hold that this burden was never met by her. It will be noted that the affidavit of appellee did not charge that appellant had stolen the goods, but that they "have, within two hundred days last past, by some person or persons unknown, being feloniously stolen, taken and carried away * * * and that the said Thomas hath probable cause to suspect, and doth suspect, that the said goods and chattels are now concealed in the premises of one Rachael Brown and Mary Levy." There is nothing in the record to show that some person other than appellant did not steal the goods and secrete them on her premises. As before mentioned, appellant did not deny that they were never there, and Mrs. Levy did not deny even that she did not take them there. It thus becomes obvious that the real charge made by appellee was never met by any evidence whatever. The sole ground upon which appellee bases her contention

that she met the burden of showing want of probable cause is her previous good reputation. That, standing alone as it does, cannot support such burden. Good reputation, in this connection, while it is competent as evidence tending to rebut in some cases, the presumption of probable cause, is by no means conclusive. It is but a single fact or circumstance to be considered along with others in the case. The burden of showing lack of probable cause, while it may be said to be negative in its character, is no less a burden. Bacon v. Towne, 4 Cush. (Mass.), 237. It must be met by evidence such, that if no evidence was introduced by the defendant, the court would be justified in referring the case to the jury. To hold that a plaintiff in a suit of this kind could come into court and, without denying the specific charges made in the original suit, recover on the sole ground that his previous reputation had been good, would put a premium on dishonesty and make it unsafe for any person to prefer a charge against another without direct and absolute proof of that other's guilt. "Where a citizen acts in good faith in assisting the officers of the law to apprehend and bring to the bar of justice those guilty of crime, or against whom probable cause exists of the commission of crime, such action is to be commended, and not condemned." Pickford v. Hudson, 32 App. D. C., 480-6.

A search such as was made in this case is almost always attended with uncertainty from the very nature of the proceeding; and while it is certainly true that the law does, and by all means should, discourage the bringing of suits without reasonable cause, because of the unavoidable suffering entailed thereby, it is equally true that the interests of justice demand that no restriction should be imposed which would render timid the man who honestly, and with sufficient cause suspects that another has done him injury and violated the law. The danger in one direction is as grave as that in the other; and the two extremes, operating in this manner, have resulted in a well defined line of cases.

In McCormick v. Conway, 12 La. Ann., 53, the plaintiff was charged by defendant with passing a counterfeit bank note with knowledge. Plaintiff was not imprisoned and there was no proof of actual damage. The jury found for plaintiff and, on appeal, the court said: "We seached the evidence carefully and find no proof of malice or bad faith on the part of the defendant. It is true that malice may be inferred from an utter absence of probable cause, but in such case the absence of probable cause to form the basis of a presumption of malice should be shown affirmatively and positively. In the case at bar the defendant is shown to be a man of good character, and no fact has been brought to our notice which would induce the belief that he had a motive which could prompt him to make a false accusation against the plaintiff.

In Legallee v. Blaisdell, 134 Mass., 473, it appeared that Blaisdell was administrator of the estate of one Jones. He applied to a master in chancery for a certificate authorizing the arrest of plaintiff on the ground that he was about to leave the State in violation of his obligation to pay a judgment against him in favor of the estate. His arrest followed. It developed on hearing, and was admitted by the

defendant, that, as a matter of fact, such an intention was conclusively shown by the evidence not to have been entertained by the plaintiff. Defendant offered no evidence and asked the court to direct a verdict in his favor, which was done. Held not to be error on appeal.

Mr. Bigelow, in his "Leading Cases on the Law of Torts," speaking of the want of probable cause, says: "There ought to be enough to satisfy a reasonable man that the accuser had no ground for proceeding but his desire to injure the accused." Citing Williams v. Taylor, 6 Bing., 183-6.

In this case appellee, under oath, had declared his belief that property, which had been stolen from him, was secreted on the premises of these two women. To meet this positive statement practically all that appellant has attempted to show is her previous good reputation. At the trial, as already stated, neither of the women denied that the goods had been secreted there, and one of them, Mrs. Levy, did not deny that she had taken them on the premises. Express malice on the part of appellee is admittedly lacking. The authorities show that in order to form the basis of inferred malice the want of probable cause must appear "affirmatively and positively." Appellant seeks, in effect, to make good reputation alone the basis of want of probable cause, and then, in turn, to create inferred malice out of this want of probable cause; in short, to base one inference on another. Were express malice actually present there might be evidence to warrant a finding of want of probable cause, but this evidence seems to us to be clearly insufficient to establish that degree of proof of want of probable cause undoubtedly essential where, as in this case, that want of probable cause would have to support malice, if the latter element was to be shown at all. Of course the existence of probable cause disentitles a plaintiff to recover even though malice is shown. Spitzer v. Friedlander, 14 App. D. C. 556. We think, however, that where express malice is shown the degree of proof required to show want of probable cause is lessened.

The prima facie showing of probable cause which the law, for reasons already given, assumes for the protection of a defendant, strengthened by the appellee's sworn statement of his belief that the stolen goods were concealed on the premises of appellant, and Mary Levy was, we think, amply sufficient to offset the mere evidence of reputation or character. And when the failure of both appellant and Mary Levy to meet at any point in the proceeding the real charge of appellee as to the alleged concealing of his property, this conclusion seems inevitable.

The propriety of the court's withdrawing the case from the jury seems undoubted. The jury finds the facts; the court determines whether those facts constitute want of probable cause; but where, as in this case, the facts are not in dispute or are clear, it becomes the duty of the court to determine, as matter of law, the question of probable cause. Slater v. Taylor, 31 App. D. C., 104. It is true that malice may be inferred by the jury alone, but, obviously, where the whole evidence, if admitted to be true, is, in the court's opinion,

sufficient to establish the want of probable cause, an essential element, it would be futile longer to consider other elements.
Judgment affirmed with costs.

No. 2008. January Term, 1910.

RACHAEL B. BROWN, Appellant,
vs.
THOMAS O. SELFRIDGE.

Appeal from the Supreme Court of the District of Columbia.

TUESDAY, *January 4th*, A. D. 1910.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Supreme Court, in this cause, be, and the same is hereby, affirmed with costs.

Per Mr. JUSTICE ROBB.
January 4, 1910.

In the Court of Appeals of the District of Columbia.

No. 2008.

RACHEL B. BROWN, Appellant,
vs.
THOMAS O. SELFRIDGE.

Now comes the appellant, Rachel B. Brown, through her Attorneys, Wilton J. Lambert and Rudolph H. Yeatman, and moves the Court to grant a writ of error from the Supreme Court of the United States to this Honorable Court in the above entitled cause, to stay the issuance of the mandate, and to fix the amount of bond for costs on writ of error.

WILTON J. LAMBERT,
RUDOLPH H. YEATMAN,
Attorneys for Appellant.

(Endorsed:) No. 2008. Rachel B. Brown, Appellant, vs. Thomas O. Selfridge. Motion for writ of error, etc. Court of Appeals, District of Columbia. Filed Jan. 21, 1910. Henry W. Hodges, Clerk.

No. 2008.

RACHAEL B. BROWN, Appellant,
vs.
THOMAS O. SELFRIDGE.

TUESDAY, *February 1st*, A. D. 1910.

On motion of Mr. W. J. Lambert, of counsel for the appellant, it is ordered by the Court that a writ of error to remove this cause to

the Supreme Court of the United States issue, and the bond for costs is fixed at the sum of three hundred dollars. And it is further ordered that the mandate in said cause be, and the same is hereby stayed until further order.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between Rachael B. Brown, Appellant, and Thomas O. Selfridge, Appellee, a manifest error hath happened, to the great damage of the said Appellant as by her complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the first day of February, in the year of our Lord one thousand nine hundred and ten.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Allowed by

——— ———.

(*Bond on Writ of Error.*)

Know all Men by these Presents, That we, Rachel B. Brown, as principal, and Louis P. Shoemaker, as surety, are held and firmly bound unto Thomas O. Selfridge in the full and just sum of three hundred dollars to be paid to the said Thomas O. Selfridge, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to *to* be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this — day of February, in the year of our Lord one thousand nine hundred and ten.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said Court, between Rachel B. Brown, appellant, vs. Thomas O. Selfridge a judgment was rendered against

the said Rachel B. Brown and the said Rachel B. Brown having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Thomas O. Selfridge citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such, That if the said Rachel B. Brown shall prosecute said writ of error to effect, and answer all costs if she fail to make her plea good, then the above obligation to be void; else to remain in full force and virtue.

RACHEL B. BROWN. [SEAL.]
LOUIS P. SHOEMAKER. [SEAL.]

Sealed and delivered in the presence of—

——— ———.

Satisfactory.
GORDON & GORDON,
For Selfridge.

Approved by—
SETH SHEPARD,
Chief Justice Court of Appeals
of the District of Columbia.

[Endorsed:] No. 2008. Rachael B. Brown, Appellant, vs. Thomas O. Selfridge. Bond on writ of error to Supreme Court United States. Court of Appeals, District of Columbia. Filed Feb. 18, 1910. Henry W. Hodges, Clerk.

UNITED STATES OF AMERICA, *ss:*

To Thomas O. Selfridge, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein Rachael B. Brown is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Seth Shepard, — Justice of the Court of Appeals of the District of Columbia, this 18th day of February, in the year of our Lord one thousand nine hundred and ten.

SETH SHEPARD,
Chief Justice of the Court of Appeals
of the District of Columbia.

Service accepted Feb. 18th, 1910.
GORDON & GORDON,
Att'ys for Thomas O. Selfridge.

[Endorsed:] Court of Appeals, District of Columbia. Filed Feb. 18, 1910. Henry W. Hodges, Clerk.

Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 30 inclusive contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Rachael B. Brown, Appellant, vs. Thomas O. Selfridge, No. 2008, January Term, 1910, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 21st day of February A. D. 1910.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 22,035. District of Columbia Court of Appeals. Term No. 214. Rachael B. Brown, plaintiff in error, vs. Thomas O. Selfridge. Filed February 23d, 1910. File No. 22,035.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1911.

No. 214.

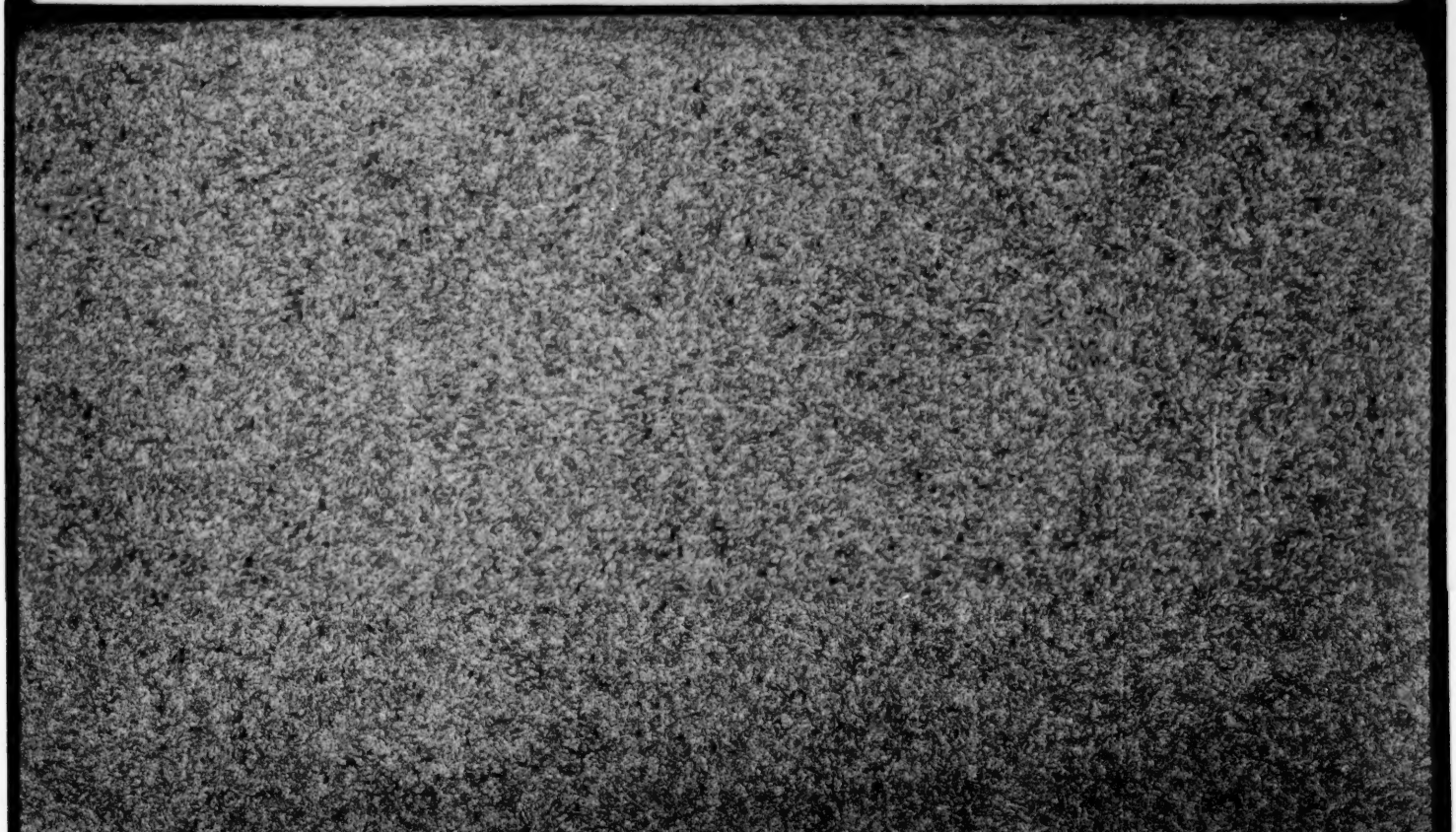
RACHEL B. BROWN, PLAINTIFF IN ERROR,

vs.

THOMAS O. SELFRIDGE, DEFENDANT.

BRIEF FOR PLAINTIFF IN ERROR.

WILTON J. LAMBERT,
Attorney for Plaintiff in Error.



IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1911.

No. 214.

RACHEL B. BROWN, PLAINTIFF IN ERROR,

vs.

THOMAS O. SELFRIDGE, DEFENDANT.

BRIEF FOR PLAINTIFF IN ERROR.

This is an appeal of Rachel B. Brown, plaintiff in the trial court, from the judgment of the Court of Appeals of the District of Columbia, affirming the judgment of the Supreme Court of the District of Columbia in favor of Thomas Selfridge, the defendant in the trial court, on a verdict directed by the court.

Statement of Case.

This is a suit instituted in the Supreme Court of the District of Columbia by Rachel B. Brown, hereinafter referred to as "plaintiff," against Thomas O. Selfridge, hereinafter referred to as "defendant," to recover damages because of a prosecution against her alleged to have been instituted by the defendant in the police court of the District of Columbia, maliciously and without probable cause. As a result of that criminal proceeding the evidence discloses that her premises—717 Eighth street northwest, of this District, were searched by police officers, against her will, in an effort to locate certain property of the defendant, claimed in the affidavit on which the search warrant was issued was stolen by someone unknown to defendant.

Plaintiff, a middle-aged white lady, had known defendant for about eight or nine years prior to the spring of 1907, having been employed by him as cook, and also as his housekeeper after the death of his first wife (Rec., p. 13). In the latter part of the spring of 1907 she left the service of defendant for the purpose of opening a boarding house, which she did in the following August. On December 26, 1907, while conducting a boarding house at 717 Eighth street northwest, defendant, in company with three detectives or police officers, entered the premises of appellant and searched them from top to bottom, causing trunks to be broken open, drawers to be ransacked, and cupboards searched. On that date defendant had made an affidavit in the police court of the District of Columbia affirming that twelve curtains, of the value of $300, belonging to him, had, within 200 days last past, by some person or persons unknown, been feloniously stolen, and that he had probable cause to suspect, and did suspect, that the goods were concealed in the premises of plaintiff and Mary Levy, known as 717 Eighth street northwest, in the city of Washington, District of Columbia (Rec., p. 6). On this affidavit a search

warrant was issued directed to the major of police of the District of Columbia, directing him, with the necessary and proper assistance, to enter, in the daytime, the said premises and there diligently search for the said goods, and to take the bodies of plaintiff and Mary Levy and bring them before the police court of the District of Columbia to be disposed of and dealt with according to law if the said goods or any part thereof were found upon such search (Rec., p. 7).

After making a thorough search of the premises the goods alleged to have been stolen were not found, and thereupon an endorsement was entered on the back of the warrant by one of the officers who made the search to the effect that the premises had been searched and nothing found, and the case in the police court was subsequently *nolle prossed* by the Assistant District Attorney with the consent of the court (Rec., p. 7).

As a result of this action of the defendant, in causing the search of her premises, plaintiff became ill and was rendered unable to attend properly to her business affairs, and finally had to close her boarding house (Rec., p. 16).

Plaintiff testified that the search was made against her will, and that at the time she did not know what the officers were searching for, and was not informed of the reason of the search until a week later; that she had not taken anything from the defendant or from his house, and had not been accused of stealing or taking anything of that kind before (Rec., p. 16).

It further appears from the testimony of six witnesses (Rec., p. 13), that they knew the reputation of the plaintiff for honesty and integrity and that it was good. Plaintiff testified that during her employment by the defendant she had been entrusted by him with the handling of money; that she had often opened the house in the fall and would be there alone three or four days, during which time the house was completely furnished; and that she would then

have charge of the house. This occurred during every year that she was in his employ, except one year when defendant and his family and she came back to Washington together after a vacation (Rec., p. 14).

At the conclusion of the testimony-in-chief on behalf of the plaintiff, on motion of counsel for the defendant, the court directed a verdict in favor of the defendant, and entered judgment thereon.

Assignment of Error.

1. The court erred in directing the jury to return a verdict in favor of the defendant (Rec., p. 21).

ARGUMENT.

The grounds on which the trial court based its action in directing a verdict in favor of the defendant were twofold, viz:

(1) That the evidence produced by the plaintiff did not show *prima facie* want of probable cause for the prosecution, and

(2) That the evidence also failed to disclose *prima facie* malice.

We will take up and consider the objections separately.

I.

Does the evidence disclose prima facie want of probable cause?

It is undoubtedly the law that the burden is upon the plaintiff in an action for malicious prosecution to establish

want of probable cause by a preponderance of the evidence; but it must be borne in mind that this rule of evidence requires proof of a negative character, and while the burden is the same as it is in a case requiring the establishment of an affirmative issue, yet the character and amount of evidence in the two cases necessarily differs.

In the nature of things, a less amount and different class of evidence is required to establish a negative than an affirmative. Mr. Greenleaf, in his work on evidence, speaking of the burden of proof of negative allegations, says:

> "To this general rule, that the burden of proof is on the party holding the affirmative, there are some exceptions, in which the proposition, though negative in its terms, must be proved by the party who states it. One class of these exceptions will be found to include those cases in which the plaintiff grounds his right of action upon a negative allegation, and where, of course, the establishment of this negative is an essential element in his case, as, for example, in an action for having prosecuted the plaintiff maliciously and without probable cause. Here the want of probable cause must be made out by the plaintiff, by some affirmative proof, though the proposition be negative in its terms. * * * In these and the like cases it is obvious that plenary proof on the part of the affirmant can hardly be expected, and, therefore, it is considered sufficient if he offers such evidence as in the absence of counter testimony *would afford grounds for presuming that the allegation is true.*"

To the same effect is Jones on Evidence, section 178.

The plaintiff, as has been pointed out, had been employed by the defendant for nine or ten years (Rec., p. 13), was entrusted with the handling of money by the latter, and permitted to take charge of his house, full of furniture and valuables, for a week at a time (Rec., p. 14), and was never accused of stealing or wrongdoing before (Rec., p. 16). Having honestly accumulated a little money from her small

earnings, and desiring to better her condition in life, she left his service, of her own accord, in the spring of 1907, and in the following August opened a boarding house at 717 Eighth street northwest. Living with her, and assisting her in conducting this establishment, was her friend Mary Leavy, who is mentioned in the complaint and warrant complained of. Plaintiff was getting along nicely, when, on the 26th of December, 1907, without any forewarning, three officers of the law, accompanied by defendant, invaded her dwelling and ransacked it from top to bottom.

As shown by the record, plaintiff had an unimpeachable record for honesty and integrity.

The curtains alleged to have been stolen were not found on plaintiff's premises; she had not taken them, nor had she taken anything else from Admiral Selfridge or from his house, and she did not know what was being sought for by the defendant until a week afterwards (Rec., p. 16).

The case of Olsen *vs.* Tvete, 46 Minn., 225, is analogous to the case at bar. The court states the case and its ruling as follows:

> "At the trial the plaintiff presented proof tending to show that the defendant caused the proceeding to be instituted and carried on; that upon a search of his premises in accordance with the directions of the warrant the property alleged to have been stolen and to be there concealed was not found; that this was so returned by the officer with his warrant; and that the plaintiff had long borne a good reputation for honesty and integrity. The court then dismissed the action. We think that the proof made a *prima facie* case of want of probable cause from which malice might be inferred, and that it was error to take the case from the jury. It is true that the burden was upon the plaintiff to show that the proceeding was instituted by the defendant without probable cause and with malice. But in such a case it must often be that the only proof possible from the plaintiff is of a negative character, and in reference to matters peculiarly

> within the knowledge of the defendant; and hence less satisfactory and convincing proof is required of the plaintiff to shift the burden on the defendant than would otherwise be necessary. The proof of a thorough search and the official return to the warrant that the property was not found in the plaintiff's possession was *prima facie* proof that the property was not there and that the plaintiff was not guilty of concealing stolen goods, or of larceny. Proof of the plaintiff's good reputation for many years in the community went to show an improbability that the plaintiff would be guilty of the conduct implied in this charge, and of this the defendant is presumed to have been aware. McIntire *vs.* Levering, 148 Mass., 546; Israel *vs.* Brooks, 23 Ill., 575; Blizzard *vs.* Hays, 46 Ind., 166; Woodworth *vs.* Mills, 61 Wis., 44. Such proof having been made it was fairly incumbent on the defendant to show affirmatively, as he could easily do, the facts, if any existed, justifying a belief on his part in the truth of the allegations upon which the search warrant was procured."

Commenting upon the latter part of the Minnesota court's opinion the trial court says:

> "That seems to me to be arguing in a circle. It says that you are to prove a negative, but inasmuch as it is difficult to prove a negative, you do not have to prove it as you would have to do in other cases. I do not understand the law to be that. I understand the law to be that it is just a case like any other case; that when the burden is upon you, you must establish that burden, and because it is difficult of establishment it does not overcome or change the law."

The reasoning of the Minnesota court, we submit, is unassailable and its application true, especially when the rule of evidence stated by Greenleaf and other authors in regard to the proof of negative issues is considered. It would seem that the trial court in his reasoning fell into error in not distinguishing between the nature of a negative and that of

an affirmative issue and the kind of proof required by each. His argument is intended to start out with the major premises that the nature of the *proof* of negative and affirmative issues must be the same. It follows, therefore, that his conclusions are erroneous and for the reasons stated by Greenleaf and the Minnesota court.

The appellate court, in its opinion affirming the action of the lower court, omits to mention, comment upon or consider the Minnesota case for the reason, we respectfully submit, that that case cannot be distinguished, and to warrant the action of the former court must be wholly disregarded.

In disposing of the case the appellate court takes the ground that the failure of evidence to establish want of probable cause is the only proposition to be considered, and persistently states that the only evidence adduced by the plaintiff for that purpose is the former good reputation of the plaintiff for honesty and integrity. The court then lays great stress on the fact that the plaintiff and Mary Levy did not deny that the alleged stolen curtains were upon the premises. Indeed, it would seem that such omission of direct testimony controlled its action, although, as will be seen by the record, it never occurred to counsel in the trial court, nor to the trial justice, that there could be any misunderstanding of the testimony of the position of the plaintiff that she knew nothing of defendant's curtains, and consequently they were not upon her premises. We respectfully submit that such reasoning is not sound and should not be followed. The court overlooks the fact that there could be no question, at least in so far as the establishment of a *prima facie* case is concerned, but that the alleged stolen curtains were not upon the premises, after the showing in the testimony that three detectives and the defendant had searched the premises carefully and cautiously, ransacking drawers and looking into every nook and corner, and that the search revealed that the curtains were not on the premises. This, in itself, is sufficient evidence from which the jury could find that the

curtains were not upon the premises. This was one of the reasons that influenced the Minnesota court in the rendition of the opinion quoted from the evidence of a thorough search of the premises and the failure to find the curtains was certainly proof from which the jury could find, as a fact, that the curtains were not there.

The appellate court again states that Mary Levy did not deny that the goods were upon the premises. We think, for the reasons stated in the last paragraph, that no express denial on the part of Mrs. Levy could be considered absolutely necessary.

It is law, that requires no citation of the many authorities that can be found in the reports of the opinions of this court and in the Court of Appeals of the District of Columbia, that a motion to direct a verdict is admission of every fact in evidence and of every inference reasonably deducible therefrom, and that the motion should be granted only when but one reasonable view can be taken of the evidence and the conclusions therefrom, and that view is utterly opposed to the plaintiff's right to recover in the case. In this case we find the plaintiff compelled to establish a negative averment; the person who can throw the most light upon the prosecution complained of is the defendant; all the facts that would tend to unveil the cause of the prosecution were in the control of the defendant, and yet the defendant assumes, in the face of the testimony of the good reputation of the plaintiff for honesty and integrity, of his former trust in her, of the fact that the premises were unexpectedly searched by three police officers and himself, and the curtains were not found, and of the fact that plaintiff expressly denies having taken anything from him, to remain silent and asks the court to direct a verdict in his favor.

We do not see what more the plaintiff could do to show want of probable cause. She did not know what the defendant was searching for until a week after her house was entered. If the defendant had probable cause for taking the

action he did, then it would be the easiest thing in the world to show such in his testimony, and rebut the natural conclusions of want of such cause from the testimony adduced.

Was there evidence in this case from which the jury could find that the act of the defendant was malicious?

The question of malice is one exclusively for the jury.

In the case of Stewart *et al. vs.* Sonneborn, 98 U. S. 187, 25 L. Ed., 116, it appears that the lower court instructed the jury that if they found that the defendant in that case had improperly instituted bankruptcy proceedings against the plaintiff, then the plaintiff should recover, and this court held that the lower court erred because it excluded the consideration of two of the essential elements necessary to constitute malicious prosecution, namely, want of probable cause and malice. And in so holding the court announces that the question of malice was exclusively for the jury. It says:

> "And the existence of malice is always a question exclusively for the jury. It must be found by them or the action cannot be sustained. Hence it must always be submitted to them to find whether it existed. The court has no right to find it, nor to instruct the jury that they may return a verdict for the plaintiff without it. Even the inference of malice, from the want of probable cause, is one which the jury alone can draw. Wheeler *vs.* Nesbit, 24 Howard, 545; Newell *vs.* Downs, 8 Black, 523; Johnson *vs.* Chambers, 10 Ired. L., 287; Van Voorhees *vs.* Leonard, 1 N. Y. Sup. Ct. (T. & C.), 148; Schofield *vs.* Ferrers, 47 Pa., 194. In Mitchell *vs.* Jenkins, 5 B. and Ad., 588, Lord Denham said, 'I have always understood the question of reasonable or probable cause on the facts found to be a question for the opinion of the court and malice to be altogether a question for the jury.'"

We cannot see why the trial court is inhibited from finding that there was malice, and permitted to find that there was not malice; the reasons for the one proposition must necessarily govern the other.

Even the Court of Appeals, in the case of Staples *vs.* Johnson, 25 App. D. C., 155, at pages 159 and 160, uses the following language:

> "Malice is a question exclusively for the jury, and while probable cause is a mixed question of law and fact, becoming a question of law after the facts are ascertained, and devolving upon the court the duty to instruct the jury as to the law arising upon the facts, the trial justice, in view of the proofs in the case at bar, would clearly have erred had he granted the first prayer and instructed the jury to find for appellant. There was evidence which required that question to be submitted to the jury. Appellant did not prefer the charge in hot blood. He was deliberate in all his actions. The appellee had been in his employ for something like three years. He was a man of good reputation. He had been trusted by the appellant for a year and a half with the small sum he was charged with embezzling. He had been discharged without notice and for a trivial cause. There was enough in the facts to warrant the consideration by the jury of the question of malice."

The facts stated by the court as being sufficient to warrant the jury to find malice in the foregoing case are not substantially different from the facts in this case, and if anything, they are of less weight. Plaintiff, in the case at bar, had been in the employ of defendant for a longer time than Johnson had been in the employ of Staples, and had been entrusted with these curtains, together with other household furniture of defendant, together with sums of money, and bore an excellent reputation for honesty and integrity, and had never been charged with any wrongdoing by the defendant or any one else at any other time.

It is therefore respectfully submitted that the trial court erred in directing a verdict in favor of the defendant at the close of the plaintiff's case in chief, and that the judgment of the Court of Appeals of the District of Columbia, affirming the judgment of the Supreme Court of the District of Columbia, should be reversed.

WILTON J. LAMBERT,
Attorney for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 214.

RACHEL B. BROWN, PLAINTIFF IN ERROR,

vs.

THOMAS O. SELFRIDGE, DEFENDANT.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR DEFENDANT.

I.

Statement of the Case.

Rachel B. Brown, as plaintiff, filed her declaration in the Supreme Court of the District of Columbia against Thomas O. Selfridge, as defendant, in which she alleged:

> "That the said defendant, contriving and maliciously intending to injure the plaintiff in her good name, fame, and credit, and to bring her into public scandal, infamy, and disgrace, on the said 26th day of December, A. D. 1907, appeared before the

judges of the Police Court of the District of Columbia, and then and there under oath falsely, maliciously, and without probable cause, charged that twelve curtains of the value of three hundred dollars ($300), the personal chattels of said defendant, Thomas O. Selfridge, had within two hundred days last past, by some person or persons unknown, been stolen, taken, and carried away out of his possession in the District of Columbia, and county of Washington, and that he had probable cause to suspect and did suspect that said goods and chattels were concealed in the premises of the plaintiff and Mary Levy, known as No. 717 Eighth street northwest, in the city of Washington, in said county and District, that upon said affidavit the said defendant, without any reasonable or probable cause whatever, procured the judges of said Police Court to issue a warrant under their hand and the seal of said Police Court, directed to the major of police of the District of Columbia, in which said warrant the gist of said affidavit was set forth, and the said major was thereby authorized and required in the name of the United States, with the necessary and proper assistance to enter, in the daytime, into said premises, there to diligently search for the said goods, and if the same or any part thereof be found upon said search, to bring the goods so found, and the bodies of said Rachel Brown and Mary Levy before the Police Court of the District of Columbia, to be disposed of and dealt with according to law."

The plaintiff further alleged that, by virtue and under color of said warrant, search was made for said goods, alleged to have been stolen, upon the premises; that nothing was found, and the cause having been docketed in said Police Court was *nolle prossed* and "said charge and proceeding aforesaid was thereby wholly and forever ended and determined" (Rec., pp. 2 and 3).

To this declaration the defendant pleaded "not guilty as alleged." Issue was joined and the cause came on for trial before a jury in the circuit court.

To maintain her cause the plaintiff placed in evidence the following:

(1) An affidavit signed by the defendant (Rec., p. 6).
(2) A search warrant issued upon said affidavit (Rec., pp. 6 and 7).
(3) Record of the case in the Police Court (Rec., p. 7).

(1) The affidavit sets forth the loss of the goods of the defendant and that they had been by some person or persons unknown stolen, taken, and carried away, out of the possession of the defendant, and that he—

> "hath probable cause to suspect, and doth suspect, that the said goods and chattels are now concealed in the premises of one Rachel Brown and Mary Levy, known as No. 717 8th St. N. W., in the city of Washington, in the said county and District."

(2) The warrant issued upon said affidavit recites that, whereas, it appears by the information and oath of Thomas O. Selfridge that certain of his goods have been stolen and "that the said Thomas O. Selfridge hath probable cause to suspect, and does suspect, that the said goods and chattels are now concealed in the premises of one Rachel Brown and Mary Levy, known as number 717 8th Street, N. W.," therefore the said warrant is issued and the Major of Police authorized to make search for the said goods on the said premises.

(3) The record from the Police Court bears the following:

> "No. 156,303. U. S. search warrant, to search premises of Rachel Brown and Mary Levy, 717 8th St., N. W. Search made and nothing found. P. M. J. W. Green, M. P. *nolle prossed.* Ralph Given, Asst. U. S. Att'y, D. C. Jan. 11, 1902."

Further to maintain her cause, the plaintiff produced as a witness Mary Levy, who testified to the search of the premises; the presence of the defendant; and failure to find the goods alleged to have been stolen. This witness also testified that she knew the reputation of the plaintiff for honesty and integrity, and that it was good. Six other witnesses were produced who testified that they also knew the reputation of the plaintiff for honesty and integrity, and that it was good.

The plaintiff also testified, in her own behalf, that she had been in the employ of the defendant for about nine or ten years prior to January, 1907; that she left his employ to keep house for herself; that during her employment by the defendant she had acted as his cook and housekeeper; that in the absence of the family she had opened the house for them and prepared it for their return; and that she had done the marketing and handled the market money. She described the search of the premises, and stated that the defendant was there all the time; that the door-bell rang and the colored servant went to the door and admitted two men; that just as she entered the stairs, one of the detectives and the Admiral (the defendant) came in; that she said: "Why, Admiral, what do you want in here?" and "shook hands with him, but he never said a word;" and that she had not taken anything from the defendant or from his house, and had not been accused of stealing or taking anything of that kind before.

The plaintiff having closed her case, on motion of the defendant the Court directed the jury to render a verdict for defendant, and judgment was entered thereon. From this judgment appeal was made to the Court of Appeals for the District of Columbia, where the judgment below was affirmed.

From that affirmance the case comes to this Court.

II.

Points for Defendant.

The judgment of the Court of Appeals was correct.

The contention on the part of the plaintiff is that on the evidence produced, to wit, proof that the case had been *nolle prossed* in the Police Court, and proof of good character, coupled with the presumption that the defendant must have known of such good character from his long employment of the plaintiff, she, the plaintiff, had made out a *prima facie* case of want of probable cause and of malice, as required by law.

This position is not in consonance with the recognized authorities. All declare that to support an action of the character under consideration there must be *proof* of both elements, want of probable cause and malice; such proof must be made affirmatively; unless both want of probable cause and malice are shown to exist, the case must fail, and the *onus probandi* is upon the plaintiff to show each.

On this subject this Court has spoken in no uncertain terms.

In Wheeler *vs.* Nesbitt, 24 Howard, 544, speaking of the character of proof required in cases such as that under consideration, Mr. Justice Clifford says (p. 549):

> "He (the plaintiff) must also prove that the charge preferred against him was unfounded, and that it was made without reasonable or probable cause, and that the defendant in making or instigating it was actuated by malice."

It will be observed that the court uses the words "must also *prove*," and as showing that the full meaning of the words, as importing positive and affirmative proof, is intended, the court proceeds (p. 550):

> "Proof of these several facts is indispensable to support the declaration, and clearly the burden of proof in the first instance is upon the plaintiff to make out his case, and if he fails to do so, *in any one of these particulars*, the defendant has no occasion to offer any evidence in his defense." (The italics are ours.)

This language means what it says or it means nothing. This Court does not give utterance to meaningless words, so we may assume that its rule as thus laid down expresses the rule of law in cases of this kind.

And on pages 550-551 the Court, approving the decision in Stone *vs.* Crocker, 24 Pick., 83, says:

> "There are two things, say the Court in that case, which are not only indispensable to the support of the action, but lie at the foundation of it. The plaintiff must show that the defendant acted from *malicious motives* in prosecuting him, and that he had *no sufficient reason* to believe him guilty. If either of these be wanting, the action must fail; and so are all of the authorities from a very early period to the present time."

It will be seen that no charge is made in the affidavit upon which the search warrant issued that the *plaintiff* had taken the goods lost by the defendant. On the contrary, it is distinctly averred that said articles had been taken by some "person or persons unknown." Let us turn again to the decision of this Court referred to above. The Court said: "He must prove that the charge against him was unfounded." Even admitting that the warrant justified the presumption that the charge presented was against the plaintiff, there has been an utter failure to show that the charge was unfounded. The charge was that the goods of the defendant were in the premises directed to be searched. Now, while there is the statement of the witness, the plaintiff, in her own behalf to the effect that "she

never took anything belonging to the defendant," there is not one word in the evidence to the effect that the goods lost had never been upon the premises searched, or, indeed, that they were not there at the time of the actual search made. No question is asked by her counsel in this regard, and she does not herself touch upon that point. Though she may never have taken anything of the defendant's, *non constat* that the goods lost were not and had not been on the premises, or, indeed, were not there at the time of the search, as stated in the affidavit, and the gravamen of the latter therefore remains uncontradicted.

Let us turn to the case for a moment and see what was before the court:

The plaintiff had put in evidence the fact that a warrant had been sworn out by the defendant; that under that warrant a search had been made on her premises; that no goods had been found; that the defendant was there; that on return of the warrant the case had been *nolle prossed*, and that her character was good.

And she asked that this evidence be submitted to the jury, that they might infer from it that the defendant had been actuated by actual malice against her and without probable cause. The justice trying the case refused, most properly, to do as asked.

The fact that the case was *nolle prossed* in the Police Court, while a necessary item of proof in the chain of claim of the plaintiff, as an evidence to meet the requirements of the law as to the malicious character of the act of the defendant, has no value.

On this subject this Court has settled the law in Stewart *vs* Sonneborn, 98 U. S., 195, declaring:

> "In every case of an action for malicious prosecution or suit, it must be averred and proved that the proceeding instituted against the plaintiff has failed, but its failure has never been held to be evidence of either malice or want of probable cause

for its institution, much less that it is conclusive of those things."

So it will be seen that the *nolle prossing* of the case is no factor in the evidence, as showing either want of probable cause or malice, and we are left with the mere fact of good character proven upon which to base the case of the plaintiff as respects those essentials. We have shown above that there was no evidence as to the question whether or not the goods were in fact on the premises.

Surely the evidence of good character alone cannot take the place of the proof of probable cause and malice, as required by the authorities.

If there is any evidence in the cause touching the question of probable cause, it is furnished by the plaintiff and is in favor of the defendant.

The plaintiff herself, as part of her case, has put in an affidavit made by the defendant in which he swears that "he has probable cause to suspect and does suspect" that the articles in question are on the premises of the plaintiff. This affidavit, by the plaintiff's own act, becomes evidence in the case, and must be overcome by positive, contrary proof. As it stands, it is evidence of the ground upon which the defendant proceeded in securing the warrant, namely, that he *had* probable cause. And up to this time that affidavit stands uncontradicted.

In the face of this evidence, surely the mere allegation of the plaintiff's witnesses that her reputation for honesty and integrity is good can not establish want of probable cause.

And again, the rule requires that the plaintiff prove malice on the part of the defendant. In this case, there is a total lack of such proof, of an affirmative character. On the contrary, the evidence of the plaintiff establishes the fact that even at the time of the search by the officers of the law, she and the defendant greeted each other and shook hands,

thus negativing the idea of any ill will on the part of the defendant (R., p. 14).

We again quote from the case of Wheeler *vs.* Nesbitt, page 550:

> "Want of reasonable and probable cause is as much an element in the action for a malicious criminal prosecution as the evil motive which prompted the prosecutor to make the accusation; and though the averment is a negative one in its form and character, it is, nevertheless, a material element of the action, and must be proven by the plaintiff by some affirmative evidence, unless the defendant dispenses with such proof by pleading singly the truth of the several facts involved in the charge. Either of these allegations may be proved by circumstances, and it is unquestionably true that want of probable cause is evidence of malice, but it is not the same thing; and unless it is shown that both concurred in the prosecution, or that the one was combined with the other in making or instigating the charge, the plaintiff is not entitled to recover in an action of this description."

While the law does say that malice may, as a matter of law, be inferred from want of probable cause, no authority suggests that both want of probable cause and malice may be inferred.

In this connection we quote the language of the trial judge, which is most forceful.

Referring to the evidence offered, he says (p. 19):

> "In that condition the plaintiff rests and says that the proof of the discharge or *nolling* of the case and the proof of good character carries with it *prima facie evidence of the want of probable cause and malice.* Now probable cause for a criminal prosecution lies in the existence of such facts and circumstances as would reasonably excite the belief in the mind of an ordinarily cautious man, acting on the facts and circumstances within the knowledge of the prosecutor at the time, that the accused was guilty of the

crime charged. So that the fact that this plaintiff had a good character, and that is all we have in the case, carries with it the burden of proof on the part of the plaintiff; and that the proof of good character negatives, *prima facie,* the idea that Admiral Selfridge had before him such facts and circumstances as would reasonably excite the belief in the mind of an ordinarily cautious man, acting on the facts and circumstances within the knowledge of the prosecutor at the time, that the accused was guilty of the crime charged. So that the proof of good character standing alone is proof of all the ingredients of probable cause, and, therefore, he knowing that this plaintiff had a good character, that fact is sufficient to show to the jury, that because he knew she had a good character, that he was not in possession of any facts and circumstances which in the case of an ordinarily cautious and reasonable man would make him believe that she had committed this crime. Now, I am constrained to think that that is further than any good character has gone before. Proof of good character in any criminal case is only a fact to be considered by a jury, according to the Supreme Court, like any other fact in the case. It is no more; it is no less. It is a fact, and, therefore, it seems to me it is a fact here that they had the right to consider. But does it go to the extent of showing that the plaintiff in this case has shown sufficient to put the defendant upon proof that he had no facts and circumstances before him which would make a reasonably cautious man believe that the person who was charged was guilty of the theft? I cannot think it possible."

We quote at large from the language of the Court as it expresses what, in our opinion, is undoubtedly the law and demonstrates the weakness and fallacy of the contention on the part of the plaintiff.

We have not lost sight of the fact that the case of Olsen *vs.* Tevete, 46 Minn., 225, supports the contention of the plaintiff in error, but the rule as there laid down is so contrary to the rule of this Court, and the reasoning by which

the Minnesota court reaches its conclusion is so weak and illogical, that it is hardly worth considering. The trial judge, as well as the justices of the Court of Appeals, had this case before them when the matter was presented for consideration in the respective courts, but did not regard it as the law of the case.

The language of the trial judge is well worthy of consideration, wherein he criticises the above case of Olsen *vs.* Tevete (Rec., 20):

> "I can not agree with the reasoning,"

and after quoting the language of the decision, he adds:

> "That seems to me to be arguing in a circle. It says that you are to prove a negative, but inasmuch as it is difficult to prove a negative, you don't have to prove it as you would have to do in other cases. I do not understand the law to be that. I understand the law to be that it is just a case like any other case: that when the burden is upon you, you must establish that burden, and because it is difficult to establish it, does not overcome or change the rule of law. * * * But it does seem to me that in a case like this, where the only malice proved, if any at all—the proof being anything but express malice in this case—and therefore the only malice in the case is legal malice, which is to be inferred, and the want of probable cause to be inferred by reason of good character, you are *building an inference upon an inference*, if the good character proves the want of probable cause, and if there were want of probable cause, then malice may be inferred. It seems to me that that is taking it a long way from the position which the law takes, that there shall be affirmative proof both of the want of probable cause and of malice, malice being possible to infer from the want of probable cause."

This reasoning is logical and irresistible, and its conclusions are in accord with the best authorities.

And this Court surely does not recognize such a rule as that laid down by the Minnesota court; and when it says that there must be "proof" that the charge is unfounded, and "proof" of malice and of want of probable cause, before the defendant is called upon to offer any evidence in his defense, it surely cannot mean that affirmative proof shall not be required in any of the particulars enumerated, and that in the absolute absence of such proof, *inferences* may be substituted in lieu thereof, and that in the absence of proof of both want of probable cause and malice, the case is to be submitted to a jury that would have, as the case stood, nothing but vague inferences upon which to act. Such a ruling would be a travesty upon justice and a violation of the well-considered rule of law. And when we add to the fact that there is no direct proof to show that the goods were not, and never were, on the premises, save the inference that might possibly be drawn from the fact that they were not found when search was made, we have still another inference offered to take the place of proof that the charge was unfounded, as required by all the authorities.

The language of the Court of Appeals of the District of Columbia in sustaining the decision of the lower court puts the matter very clearly (p. 24):

> "It appears from the record that Mary Levy, whose name was joined with appellant's in the affidavit of appellee on which the search warrant was issued, was, and for some time prior thereto had been, living with appellant on the date of the search. Appellant testified that she had never taken anything from Admiral Selfridge, or from his house, and had not been accused of stealing anything of that kind before; *but Mrs. Levy never denied taking the goods, and at no time during the trial was it denied by either appellant or by Mrs. Levy that the goods had never been on the premises.* To meet the burden of showing want of probable cause, appellant offered in evidence the testimony of several witnesses to the ef-

fect that she had previously borne a good reputation for honesty and integrity. This evidence, appellant contended, established *prima facie*, the want of probable cause, and that the burden of proof then shifted to appellee. * * * The burden of showing want of probable cause was sustained by appellant, if at all, by the evidence of previous good reputation thus introduced; but we hold that this burden was never met by her. It will be noted that the affidavit of appellee did not charge that appellant had stolen the goods, but that they 'have, within two hundred days last past, by some person or persons unknown, been feloniously stolen, taken and carried away * * * and that the said Thomas hath probable cause to suspect, and does suspect, that said goods and chattels are now concealed in the premises of one Rachel Brown and Mary Levy.' There is nothing in the record to show that some person other than appellant did not steal the goods and secrete them on the premises. *As before mentioned, appellant did not deny that they were never there, and Mrs. Levy did not deny even that she did not take them there. It thus becomes obvious that the real charge made by the appellee was never met by any evidence whatever.* The sole ground upon which appellee bases her contention that she met the burden of showing want of probable cause is her previous good character. That, standing alone as it does, cannot support such burden. Good reputation, in this connection, while it is competent as evidence tending to rebut in some cases the presumption of probable cause, is by no means conclusive. It is but a single fact or circumstance to be considered along with others in the case. The burden of showing lack of probable cause, while it may be said to be negative in its character, is no less a burden. * * * It must be met by evidence such, that if no evidence was introduced by the defendant, the court would be justified in referring the case to the jury. *To hold that a plaintiff in a suit of this kind could come into court and, without denying the specific charges made in the original suit, recover on the sole ground that his previous reputation had been*

good, would put a premium on dishonesty and make it unsafe for any person to prefer a charge against another without direct and absolute proof of that other's guilt." (The italics are our own.)

It is submitted that there was and is no error in the holding of the Court below, and that the judgment should be affirmed.

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BROWN v. SELFRIDGE.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 214. Argued March 14, 1912.—Decided April 1, 1912.

While in an action for malicious prosecution the burden of proving malice and want of probable cause is on the plaintiff, *Wheeler* v. *Nesbit*, 24 How. 544, as the motives and circumstances are best known to the defendant, plaintiff is only required to adduce such proof as is affirmatively under his control, and which he can fairly be expected to be able to produce.

In this case *held* that plaintiff did not produce all the testimony within her control and did not sustain the burden even to that extent.

In a suit for malicious prosecution, in the absence of plaintiff adducing facts properly expected to be under her control, the question of probable cause in a clear case is one for the court and, in this case, was properly taken from the jury.

34 App. D. C. 242, affirmed.

THE facts are stated in the opinion.

Mr. Wilton J. Lambert for plaintiff in error.

Mr. Henry E. Davis, with whom *Mr. William A. Gordon* and *Mr. J. Holdsworth Gordon* were on the brief, for defendant in error.

MR. JUSTICE DAY delivered the opinion of the court.

The plaintiff in error brought suit in the Supreme Court of the District of Columbia against the defendant to recover damages for malicious prosecution. Judgment was entered in favor of the defendant and upon appeal to the Court of Appeals of the District of Columbia this judg-

ment was affirmed. 34 App. D. C. 242. The case was then brought to this court upon proceedings in error.

The facts as to the prosecution are, in substance: That the plaintiff, being the keeper of a boarding house in the city of Washington on or about the twenty-sixth day of December, 1907, and occupying certain premises known as 717 Eighth Street northwest, and one Mary Levy were named as defendants in a proceeding commenced by Selfridge in the police court of the District of Columbia, in which he swore out a search warrant for certain of his property, namely, twelve curtains, of the value of $300, which, he averred, had, within two hundred days last past, by some person or persons unknown, been stolen, taken and carried away out of his possession, and which, he had probable cause to suspect and did suspect, were concealed in the premises of plaintiff and Mary Levy on Eighth Street; that under authority of the search warrant certain officers, accompanied by the defendant, proceeded to search the premises, but did not find the goods in question, and that, upon return of that fact being made, the proceedings against the plaintiff and Mrs. Levy were nolled and the case thus ended.

At the trial of the case in the Supreme Court the plaintiff introduced testimony as to the prosecution and the circumstances under which the search was made, and also testimony tending to show her good reputation for honesty and integrity, and the injury to her health and occupation. At the conclusion of the plaintiff's proof the court instructed the jury to return a verdict for the defendant, upon the ground that the plaintiff had failed to make a *prima facie* showing of want of probable cause, and judgment was entered accordingly.

The question involved, therefore, is: Was there sufficient proof of the want of probable cause to carry the case to the jury?

The testimony shows that when the defendant and

officers executing the search warrant visited the house of Miss Brown, the plaintiff, search was made of the premises and also of the trunks of the plantiff and of Mrs. Levy, who, it seems, was at the time stopping with Miss Brown. As we have said, the officers found nothing.

The charge upon which the search warrant was issued did not accuse either Miss Brown or Mrs. Levy of stealing or wrongfully taking the property from the defendant, but stated that such property was thus appropriated by some person unknown, within two hundred days before the warrant was sworn out, and the belief of the defendant was alleged that the property was concealed within the premises of the persons named.

There was testimony in the record tending to show that Miss Brown had not taken the property mentioned or other property from the house of the defendant; that she was in his employ for a number of years and was trusted with monetary transactions and otherwise treated as worthy of his confidence. The plaintiff testified in her own behalf, and Mrs. Levy was called as a witness in support of her case.

The plaintiff did not show that with her knowledge or consent the alleged stolen property was not in her house or upon the premises within the time named in the search warrant. Mrs. Levy, evidently not an unwilling witness, did not testify that she had never taken the goods, or that, so far as she knew, they were never upon the premises of the plaintiff.

It is settled law that in an action of this kind the burden of proving malice and the want of probable cause is upon the plaintiff. This has been the recognized law of this court and was distinctly stated in the case of *Wheeler* v. *Nesbitt*, 24 How. 544, often cited in cases of this character, where Mr. Justice Clifford, speaking for the court, said (p. 551):

"The plaintiff must show that the defendant acted from

malicious motives in prosecuting him, and that he had no sufficient reason to believe him to be guilty. If either of these be wanting, the action must fail; and so are all the authorities from a very early period to the present time. *Golding* v. *Crowle*, Sayer, 1; *Farmer* v. *Darling*, 4 Burr. 1,974; 1 Hillard on T. 460.

"It is true, as before remarked, that want of probable cause is evidence of malice for the consideration of the jury; but the converse of the proposition cannot be sustained. Nothing will meet the exigencies of the case, so far as respects the allegation that probable cause was wanting, except proof of the fact; and the *onus probandi*, as was well remarked in the case last referred to, is upon the plaintiff to prove affirmatively, by circumstances or otherwise, as he may be able, that the defendant had no reasonable ground for commencing the prosecution. *Purcell* v. *McNamara*, 9 East, 361; *Willans* v. *Taylor*, 6 Bing. 184; *Johnstone* v. *Sutton*, 1 Term, 544; Add. on W. and R. 435; *Turner* v. *Ambler*, 10 Q. B. 257."

While it is true that the want of probable cause is required to be shown by the plaintiff and the burden of proof is upon her in this respect, such proof must necessarily be of a negative character, and concerning facts which are principally within the knowledge of the defendant. The motives and circumstances which induced him to enter upon the prosecution are best known to himself. This being true, the plaintiff could hardly be expected to furnish full proof upon the matter. She is only required to adduce such testimony as, in the absence of proof by the defendant to the contrary, would afford grounds for presuming that the allegation in this respect is true. 1 Greenleaf on Evidence, § 78. In other words, the plaintiff was only obliged to adduce such proof, by circumstances or otherwise as are affirmatively within her control, and which she might fairly be expected to be able to produce. As Mr. Justice Clifford put it, in *Wheeler* v. *Nesbitt*, *supra*,

the plaintiff must prove this part of the case "affirmatively, by circumstances or otherwise as he may be able."

It is contended by the learned counsel for the plaintiff in error that Miss Brown produced all the testimony in the case which she might reasonably be expected to control, and it is pertinently asked, What more could she prove? We think an inspection of the record furnishes an answer to the question. With respect to the search warrant, the charge was not that the plaintiff and Mrs. Levy stole or wrongfully took the property of the defendant, but the belief of the defendant was averred that the property had been by some one thus taken and was concealed in or about the premises of the plaintiff and Mrs. Levy. The plaintiff could readily have shown that, within the time named in the search warrant, so far as she knew, with the means which she had of information, the property in question had never been upon her premises. She could have shown by Mrs. Levy, whom she produced as a witness, that Mrs. Levy did not take the property from the premises of the defendant and that the property was not upon the premises of Miss Brown at any time so far as her knowledge and opportunity of knowing extended.

Failing to adduce proof of the facts to which we have called attention, and, in clear cases the question of probable cause being one of law for the court, we think that there was no error in taking the case from the jury.

Judgment of the District Court of Appeals is affirmed.